

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DAP PRODUCTS, INC.,
Employer

and

Case No.5-RC-16190

TEAMSTERS LOCAL 570,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,
Petitioner

Douglas M. Topolski, Esq.,
of Baltimore, Maryland for the Employer
Paul Douglas Starr, Esq.,
of Baltimore, Maryland for the Petitioner

ADMINISTRATIVE LAW JUDGE DECISION AND
RECOMMENDATION ON OBJECTIONS

Eric M. Fine, Administrative Law Judge. I heard this matter on March 18, 2008, in Baltimore, Maryland. Based on the evidence as a whole, including my observation of the demeanor of the witnesses,¹ I make the following findings and conclusions.²

The petition for election was filed by Teamsters Local 570, International Brotherhood of Teamsters (Petitioner) on January 4, 2008.³ Pursuant to a Stipulated Election Agreement, approved by the Regional Director on January 17, an election was conducted on February 14 and 15, in the following unit:

All full-time and regular part-time production and maintenance employees, including quality control and work leaders employed by the Employer at its Baltimore, Maryland facility, but excluding office clerical employees, professional employees, guards, and supervisors as defined by the Act.

During the election 64 ballots were cast for the Petitioner, 94 were cast against it, and there was 1 challenged ballot. The number of challenged ballots was not determinative of the results of the election. The Petitioner filed timely objections to the election.

¹ In making the findings herein, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation*, 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). Further discussions of the witnesses' testimony and credibility are set forth below.

² I have considered the Petitioner and Employer's post-hearing briefs.

³ All dates are in 2008, unless otherwise stated.

On March 5, the Acting Regional Director issued a Report On Objections and Notice of Hearing. The parties litigated at the hearing Petitioner Objection 1, which reads:

Objection 1: During the critical period, the Employer, by its supervisors and agents, distributed anti-union campaign paraphernalia to employees, thereby pressuring employees to make an observable choice that would reveal their union sentiments. By this conduct, the Employer improperly affected the free choice of the employees in voting for or against representation by the Petitioner.

A. The distribution of "Vote No" paraphernalia

Petitioner witness Jeffery Jones, at the time of the hearing, had worked for the Employer for 15 months as a line operator.⁴ Jones testified Mary Sullivan is a first shift supervisor, whose hours are 5 a.m. to 3 p.m. Jones works on the second shift with hours from 3 p.m. to 1 a.m. Jones testified that on Monday, February 11, the week of the February 14 and 15 election, "they was handing out shirts that said Vote No --." Jones explained that, "management was passing out shirts that said Vote No and hats that said Vote No and they had bandanas and everything. And management was handing them out." More particularly, Jones testified he saw Sullivan handing these items out, and he testified the shift leaders were also handing out the Vote No paraphernalia. Jones testified that he also saw Zach Hoffman, a supervisor in the drier's department, hand out a shirt and that Hoffman had shirts in his hand.⁵ Jones testified the people Sullivan and Hoffman handed the paraphernalia to were Employer associates who were eligible to vote in the election.

Jones testified he saw Sullivan hand out shirts or other "Vote No" items to at least eight different employees.⁶ This took place right outside the production office, which is in the work area. Jones testified he saw Sullivan engage in this activity around 3:10 p.m. as employees, including Jones, were coming in for the shift change. Jones testified that Sullivan was there for quite awhile. Jones stayed there for just a few minutes because he had to report to his job, which was running a machine. Jones testified, "But I stood there for a while and watched her give them out. She was you get your shirt, you want a hat, you know, handing them out. Had a handful of them." Jones testified he was about seven feet away from Sullivan when he saw her give out the items. Jones testified Sullivan did not offer him any of the items because he spoke in favor of the Union during meetings at the facility.

⁴ Jones ran a filling line where he filled tubes with caulk, packed and shipped them across a conveyor to be shipped out. Jones also ran other lines and performed a variety of tasks.

⁵ Jones only knew Hoffman's first name. However, Hoffman's last name was clarified on the record by the parties to the hearing. Jones testified the shift leaders voted in the election. Jones testified he did not think Hoffman was eligible to vote in the election, and that Sullivan was not eligible to vote. Hoffman testified and did not claim that he was an eligible voter.

⁶ Jones testified that all of the eight individuals took the items from Sullivan. He testified, "I actually could see a couple of them actually hesitated before they took it. And she's a very forceful person and to me, it seemed like she was kind of like, you know, demanding that they take it when she was, like, handing it to them, like, pushing it at them, you know. And a couple of people stood back, but then they ended up taking it from her and -- but she didn't offer me any." Jones testified that one or two of the recipients of the items put them on at that time Sullivan was handing them out. He testified a few probably just took them back to the locker room. Jones testified, "I actually saw a couple people about it and they just told me that well, I'm not going to wear it. I'm just going to keep it."

Jones testified Sullivan was handing the materials out "outside the office, right in the main aisle where you come in and you got to go past the office to get to the time clock to punch in, then you come back past around there to look to see where you going to be located for that day to work." Jones testified the employees' job assignments were posted on the window of the office. He testified there was a lot of traffic in that area at that time of the day. Jones explained traffic in the area was heavy at the time Sullivan was distributing the materials, "because you have people moving out and people coming in." Jones testified he saw "people was walking past and then everybody was talking about the fact that, you know, she was handing the shirts out and the people that was leaving, some of them had shirts on and some had shirts in their hand, if they were leaving out. And then the ones that was coming in was the ones she was handing the shirts to and ...". Jones testified he saw first shift employees leaving the job who were wearing anti union paraphernalia.

Jones testified Sullivan was handing out red Vote No shirts, hats, and bandanas. Jones explained there is a rail in front of the production office and Sullivan had the hats stacked on the rail and had shirts on her arm. Jones testified the bandanas were worn tied around peoples' legs around their head. Jones testified Sullivan had the bandanas hanging out her pocket. Jones testified, "I didn't hear nobody ask for anything. I did hear Ms. Sullivan say you want your hat? I got hats, I got shirts. I heard her say that, but I never heard anybody ask for it ...". Jones testified he did not hear Sullivan instruct anyone to put the materials on.

Jones testified that on February 11, his job assignment was about 50 or 60 feet away from where Sullivan was handing out the materials. He initially testified he could not see Sullivan from where he was working. Jones then corrected his testimony stating that he could see her from where he was working and that she stood outside the office for quite a while. Jones estimated that Sullivan was there for at least 30 minutes that he was aware. Jones testified he observed from his work station that Sullivan continued to hand out the items as people walked by and that she was saying things as she handed employees the shirts. Jones could not state how many shirts Sullivan gave out while he was at his work station.

Jones testified he saw Hoffman and Sullivan hand out the paraphernalia on the same day, which was February 11. Jones testified he saw Hoffman walk up through the plant with a couple of shirts in his hand and that Hoffman handed a Vote No shirt to an employee. Jones testified, "I was at Spec 5 and he was up at the line. I don't know what you call that line, but it's one of the lines ran by his department." Jones could not recall the name of the employee to whom Hoffman handed the shirt. However, he testified the person worked on the second shift and was a female. He testified, "I know the people on the job, but I just don't remember who it was. From a distance, I was looking and seen him hand it to her." Jones did not know whether the employee asked Hoffman for a shirt.

Jones identified a statement he had given prior to the hearing. Jones testified someone else wrote the statement and he did not know who typed it. He testified he could have received the statement from one of the union officers, or it could have been from one of his co-workers. Jones testified the statement reads, "To whom it may concern: In the month of January and February 2008, that management passed out "Vote No" shirts, hats and bandanas." Jones testified he only saw management handing out the paraphernalia on February 11, and that he did not concentrate on the January and February dates when he signed the statement. Rather,

he signed the statement because it reflected that management was passing out the described materials.⁷

B. The Employer's witnesses

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Derek Brown is the plant manager of the Employer's Baltimore facility. He has worked at the plant since November 2007. Brown testified to the following: The Baltimore plant is broken into three major areas; the production area, which is where all of the equipment, shipping and receiving areas are located; the cafeteria where employees take breaks and eat meals; and the office area where about five individuals including Brown, the HR manager and planner are located. The associates, who are DAP employees, and temporary contract employees have access to the production area. Associates, temporaries, and vendors have access to the cafeteria. Associates, supervisory personnel, and management staff have access to the office. There are four primary shifts at the plant. The first shift is Monday through Thursday from 5 a.m. until 3 p.m. The second shift is Monday through Thursday from 3 p.m. to 1 a.m. The third and fourth shifts work 12 hour shifts during the weekend.

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Brown testified that, during the course of the union campaign, the Employer distributed Vote No shirts, hats and bandanas, based on a plan that Brown developed. Brown testified the plant received these items on Friday, February 1. Brown testified the distribution plan went into effect on Monday, February 4. The distribution plan was to place the Vote No paraphernalia in an area where the associates would have access to it, but where temporaries and outsiders would not. Brown selected the office area as a place where employees could pick up the paraphernalia. He testified management wanted the employees to enter the office area through from the production area and that the employees could come in without anyone noticing them, get the paraphernalia then return to the production area.

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Brown testified, "we put a notice out they could do this the first hour of their shift." Brown explained that he selected the first hour of the shift for employees to pick up the paraphernalia because during the first hour employees are getting ready to get started and getting instructions. He testified, "They have time to, you know, visit the bathroom or whatever. They would have time to go by, swing by and get one of these." Brown testified the Employer posted two notices on Tuesday, February 5, through Wednesday February 13, describing how the employees could obtain their Vote No paraphernalia. Brown testified one of the notices was posted in the Employer's production supervisor's office on a glass visible to all the employees since this was where they received their job assignments. Brown testified the other notice was posted on a

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⁷ Counsel for the Employer, prior to beginning of Jones' cross-examination, requested a copy of Jones' pre-hearing statements. I reviewed the envelope containing Jones' statements and at the time thought it only contained one statement, a copy of which I tendered to the Employer's counsel. During course of trial, and after Jones had left the witness stand, counsel for the Petitioner represented that Jones had in fact given two statements. Upon further review, I determined there were two statements in Jones' envelope, both of similar appearance. I asked the Employer's counsel if he needed to have Jones recalled to the witness stand to question him about the second statement, and the response was, "No, I don't." I thereafter, stated for purposes of clarification of the record that both of Jones' statements showed they were faxed at the same time, one was four of 5:00 and the other five of 5:00. The first statement said, "to whom it may concern, the month of January and February 2008, DAP management passed out Vote No shirts, hats and bandanas." The second statement said, "In the month of January and February 2008, DAP's management posted the following notice in the production office: Vote No shirts, hats and bandanas are available to associates in the front office."

rotating slide on the cafeteria television. He testified the Employer posts daily communications at this location as the cafeteria is where all the employees took their breaks. Brown identified a power point slide which he testified he composed and posted as the notice. The slide reads:

5 DAP ASSOCIATES
 VOTE NO T-shirts,
 bandanas, and caps
 are available up front 1st
 hour of each shift,
 10 grab you one.⁸

While the notices limited the pick up time to the first hour of the shift, Brown testified the shirts, hats and bandanas were available to employees throughout their work day. He testified an associate could pick up the paraphernalia, "Any time that they chose to go up there and get one." Brown testified the supervisors were informed of the system for handing out these items. Brown testified, "I talked to them individually, one on one, and we had a meeting to discuss that the items were available, where they were available, and that if somebody wanted one and asked for one, where to tell them to come and get them."

20 Brown testified as follows: The Vote No paraphernalia was placed on a cubicle in the center office area. The shirts were hung over the banister of the cubicle, and the hats and bandanas were laid next to where the shirts were hung. Brown worked in the office area, which is an office complex with six offices and a big center piece. In order to enter the office area from the production area, an employee walks through two sets of doors with large glass windows. 25 Straight ahead of the employee is the banister where the shirts were hanging. After walking through the second door to enter the office, if the employee turned a hard left they could see Brown's office door, and over to the right are the HR offices. Brown testified the windows in the two doors entering the office area are about three by four feet, and that you can see into the office area from the plant by looking through windows.

30 The Employer submitted a diagram of the office area showing that the Vote No paraphernalia was located in the center of the office complex diagonally across from Brown's office. Brown testified he could not see the items from his office. The parties stipulated that the occupants of the offices in the office area could not see the paraphernalia from their office doors when they were seated at their desks.⁹ Brown testified he did not keep a list of people who 35 went in and obtained the shirts, hats, and bandanas. He explained that he did not do so, "Because my understanding of the law is that I can't spy, interrogate on employees and what they're doing during the campaign." Brown testified, "And I considered that to be spying." Brown testified, "There's no need to. I didn't really care."

40 Zachary Hoffman is employed by the Employer as operations manager for the driers department in Rooms 1, 2 and 3.¹⁰ Hoffman's hours are 8:30 a.m. to 5:30 p.m., Monday through Friday. Hoffman testified he was aware of the process for the Employer's distribution of the Vote No paraphernalia. Hoffman testified, "The process was, if an employee came to you 45 with a request for a hat, bandana or T-shirt, that you directed to the location where they were

⁸ The notice was written in large bold black ink, with the exception of the words VOTE NO, which were written in large bold red ink.

50 ⁹ The Union's attorney stated at the hearing there was no objection alleged over the Employer's posting the notices or leaving the paraphernalia in the Employer's office area.

¹⁰ Hoffman testified he did not engage in any preparation for his testimony.

set up at.” Hoffman testified then the employee elected whether to get the paraphernalia. However, Hoffman testified there was one instance where he deviated from the practice. He testified it was before he was aware of the process and “an employee came to me and I went and retrieved a shirt for them and brought that to them, but that was the only instance where
 5 that happened.” However, Hoffman then testified, “He said, I would like a bandana. And I said, okay, I’ll go grab you one. And I grabbed a bandana for an employee and brought it to him. And then I was made aware of the manner in which I took out that act was not correct and from then on it didn’t happen.” Hoffman testified Brown made him aware that it was not correct. Hoffman testified as follows as to Brown’s correcting him:

10 JUDGE FINE: He saw you doing it or how did he know?

THE WITNESS: Well, right outside of his office is the hats and T-shirts and then I was holding one. I’m sure I walked in and I made a comment about something and I walked out.

15 JUDGE FINE: Did you give it to the employee in plain view of his office?

THE WITNESS: No, sir.

JUDGE FINE: Did he see you giving it to him?

THE WITNESS: No, sir.

JUDGE FINE: Well, how did he know you did it?

20 THE WITNESS: I’m not sure if he knew. He advised me of the circumstances under which they are not handed out but which they are retrieved and I said, okay, I wasn’t aware of that, that I just handed one out.

JUDGE FINE: So was his advice related to the incident of you handing one out? Did he know you handed one out?

25 THE WITNESS: I’m not sure if he did or not, but he saw one in my hand.

I found Hoffman’s explanation of the incident to be vague and contradictory. Moreover, if the Employer truly had a policy against supervisors distributing the Vote No paraphernalia to employees then why was Hoffman not made aware of the policy prior to the articles being made
 30 available to the general employee population. Hoffman went on to testify as follows:

Q. BY MR. TOPOLSKI: Mr. Hoffman, if I may help you, I think what the judge is asking is, was Mr. Brown’s instructions to you in reaction to the incident you just spoke about or did you hear about it some other way?

35 A. I’m not sure. I can’t recall what the timeframe was from when I handed it out until when he advised me of that. I’m not sure if it was in a group meeting, what we have every morning, going over the rules of engagement, so to say, or if it was a one-on-one conversation.

JUDGE FINE: Did you say you had one in your hand at the time? You said he saw that you had one in your hand.

40 THE WITNESS: I had one in my hand. Whether he noticed it, I can’t answer that.

JUDGE FINE: But when you had one in your hand, was that when he talked to you?

THE WITNESS: No.

Q. BY MR. STARR: And you’re sure the person you gave it to was a male?

45 A. Yes.

Hoffman testified the name of the employee he gave the bandana to was Jamie Rose, and Rose is a male. He testified he gave the bandana to Rose in Room 1, which is a compounding location on the production floor. He testified that he gave the bandana to Rose in the morning
 50 one to two weeks before the election, and that Rose works on the first shift. He testified this transpired in a location that was away from the office entrance in a secluded area. Hoffman testified he did not give any items away near the office and that he did not see Sullivan giving

any of these items away. While Hoffman testified he only handed out one item and that was a bandana, as set forth above, he initially testified the item he handed out was a shirt.

Hoffman also claimed he did not recognize sign, which Brown testified was posted in two locations at the plant to notify employees of where and when they could pick up the paraphernalia. Hoffman admitted that he occasionally frequented the cafeteria, and that he had occasion to go to the production office. However, when he was shown the sign during his testimony, he testified, "No, that was not displayed at our facility." Hoffman later repeated, "This was not posted."

Mary Sullivan is employed by the Employer as the production superintendent for first shift. Sullivan's hours are 7:30 a.m. to 5:30 p.m.¹¹ Sullivan testified she was told by Brown and another individual named Dawn about the manner in which the hats, shirts, and bandanas were to be distributed. Sullivan initially testified as follows as to when she was given this information, "I think it was the Monday that was -- Monday was -- I think it was the 11th. It was a Monday, because I came in that day and they were there." Sullivan then explained that she did not know what day the hats were delivered, stating, "it might have not been the 11th, Doug. I'm sorry. It was a Monday. I know it was a Monday, because I had just come in the door and they were there and it was Monday morning." Sullivan went on to testify as follows:

Q. Okay. What's your understanding of how the distribution system was supposed to work?

A. Well, I thought that we went outside and we had them on. I wore mine every day, my shirt or hat or whatever -- went out and if anyone came to inquire about any of the things that we were wearing, we could tell them that they were in the front office and they were allowed to take them. But we were not allowed to go up to anyone and say, do you want this, do you want that? You know, we weren't allowed to do that.

Sullivan testified that, "If someone came up to me and said, oh, where did you get that shirt or whatever, I said, they're in the front office, and I did walk up, I did walk up, because some people didn't want to go into the front office by themselves." Sullivan explained that the paraphernalia was in the office where Brown and other peoples' offices were, so employees were afraid to walk up there. Sullivan testified she walked into the office with employees, and she watched them take the shirts. Sullivan testified she would do this if while she was out in the plant someone asked her if they could have a hat or a bandana. Sullivan testified, "We had bandanas and we had hats and had shirts, and if they would come up to me and say, you know -- because we wear something different every day. Oh, can I have one of those? You know, then, you know, we would tell them yes." Sullivan denied ever walking anyone to the office who did not ask for an item. Sullivan identified the Brown's sign instructing employees where and when to obtain their paraphernalia. She testified it "was placed in -- right in the front of the production office, you know, in the window, so everyone would know that they were available."¹²

Sullivan denied ever standing in the production area and handing out shirts, hats, or bandanas. She testified, "No, we weren't allowed to have -- I mean, we had our own but we weren't allowed to bring them out of the office, out of the front office. They were never brought into the production office, only ours." Sullivan denied holding an antiunion shirt that was not her own. She testified, "I had two and they were both mine." Sullivan testified she also wore an anti

¹¹ Sullivan testified she did not prepare her testimony with the Employer's counsel.

¹² Petitioner witness Steven Thompson confirmed a sign was posted in the production office notifying the employees of the availability of the paraphernalia as Brown and Sullivan described.

union bandana on her leg and on her head at the job because they wore bandanas at the job to pull their hair up before going into the plant. When asked why she wore the bandana on her leg, Sullivan testified, "It was just somewhere different to wear it. I just had it on my leg, that's all." Sullivan testified she was against the Union.

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C. Credibility

I found Jones to be a credible witness. He testified in a straight forward fashion against his Employer's interest in the presence of the plant manager. Jones was clearly aware of the Employer's anti union posture as the Employer had taken the time and expense to distribute three different "Vote No" items for the employees to wear. Jones had been working for the Employer for 15 months at the time of his testimony and therefore had an interest in maintaining his employment status. He also had very little to gain by his testimony. Jones testified in a credible fashion, given the circumstances of his testimony.

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I have considered but rejected the various arguments in the Employer's post-hearing brief as to why I should discredit Jones. The first being that Jones was the only individual in a unit of 169 employees who came forward to testify about Sullivan's actions. Given, the Employer's anti-union stance, I do not find this argument persuasive in that other employee's may have been afraid to testify against the Employer. This conclusion, is bolstered by Sullivan's testimony that employees were even afraid to go to the office area unaccompanied to pick up the anti-union paraphernalia the Employer wanted them to wear because Brown's and other management staff's offices were nearby. If employees were afraid to go to the office to engage in an act to advance the Employer's cause as evidenced by the testimony of the Employer's supervisor, it is not surprising that they did not volunteer to testify at a hearing against the Employer.

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The Employer also cites Jones' pre-hearing statement, wherein he states, "To whom it may concern: In the month of January and February 2008, that management passed out "Vote No" shirts, hats and bandanas."¹³ At the hearing, Jones admitted he only saw management handing out the paraphernalia on February 11, and he saw nothing handed out in January. Jones explained he did not concentrate on the January and February dates in the pre-hearing statement when he signed it. I found Jones' explanation to be reasonable given the nature of the statement he signed. It was a brief document, written in general terms, not given under oath, and it did not reflect the specifics of the incident in question. The document appears to be drafted to establish the Employer improperly distributed the items in question with the details of the actual distribution to be put forth at later date. As Jones credibly testified, he did not draft the document, but signed it without paying too much attention to the January and February dates therein because the substance of the document supported what he had seen, that is the Employer's distribution of the paraphernalia.

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¹³ The Employer argues in its brief that I should reject Jones' testimony in that it was much more specific than the information contained in his pre-hearing statement. It is argued the evidence contained in Jones' testimony at the hearing is untimely and should be precluded from supporting the Petitioner's election objection. Having, reviewed the applicable provisions of the NLRB Casehandling Manual cited by the Employer, I have concluded that Jones' pre-hearing statement, while not as specific as his testimony at the hearing, was sufficient to support a claim of improper paraphernalia distribution and that the Region appropriately set this matter for hearing where the specifics of the alleged distribution could be explored.

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The Employer points to claimed inconsistencies in Jones' testimony about Sullivan's distribution of the paraphernalia. In this regard, Jones first appeared to testify that Sullivan was holding shirts and hats in her hand, and then clarified his testimony to state that she was holding the shirts, and had the hats placed on a railing in front of her. He also later added she had bandanas in her pocket for distribution. Jones initially testified that he could not see Sullivan from his work area, but then corrected his testimony to state that he could see her. I did not find Jones' testimony as inconsistent as the Employer contends. Rather, I found, considering his demeanor, and the circumstances of his testimony which took place with Brown peering at him, that his testimony became more specific as his memory became refreshed by the very nature of the questions posed to him.¹⁴

On the other hand, I did not find the testimony of the Employer's witnesses to be worthy of belief. Brown testified to a policy in which supervisors were not supposed to hand out the paraphernalia on the plant floor. Rather, the paraphernalia was placed in the central office area, not far from Brown's door, and two signs were posted stating employees should pick them up within the first hour of their shift. Yet, despite this instruction, Brown admitted there was no time limit as to when the employees could pick the items up, in that they could get them at any time. Moreover, Hoffman could not explain with any specificity how he was told that he was not to distribute the materials in the plant. At one point in his quickly changing testimony, Hoffman claimed he told Brown that Hoffman had violated the rule on at least one occasion by distributing paraphernalia directly to an employee. Yet, Brown did not mention Hoffman's transgression during his testimony.

Hoffman testified he only gave out one item of the paraphernalia on the plant floor before Brown told him not to do so. However, Hoffman's testimony quickly changed even as to this distribution stating at first it was a shirt that he tendered, and then switching to state it was a bandana. I have come to the conclusion that Hoffman gave out more items than he was willing to admit, which is why his testimony vacillated as to which item actually gave out. In this regard, Hoffman claimed to have given the item to a male employee in the morning, while Jones' credibly testified that Hoffman tendered an item to a female employee after Jones started his shift which was in the afternoon.¹⁵ Jones also credibly testified he saw Hoffman out on the plant floor with shirts in Hoffman's hand. In view of Hoffman's admission, and Jones' credible testimony, I have concluded that Hoffman distributed at least two and probably more of the Vote No attire on the plant floor.

Brown testified he posted the signs describing where and when the employees should pick up the paraphernalia in the production office where all the employees received their assignments and on the cafeteria television where messages to employees were regularly posted. Brown's testimony was corroborated by Sullivan and Petitioner witness Thompson. Brown testified the signs were posted from February 5 to 13, a period of eight days. Yet,

¹⁴ Finally, the Employer argues that Jones' claim that he watched Sullivan distribute the materials for 30 minutes at the change of shift was not credible, because the employees including Jones had to report to and begin work. I reject this contention in view of Brown's testimony that he made the notices available during the first hour of the employees' shift because this was not a particularly busy time for employees. Time was apparently not that much of a concern for the Employer when it came to distributing the anti-union paraphernalia as Brown went on to testify that the employees could pick up the paraphernalia any time they wanted. Moreover, Jones testified he reported to his machine and began work, but from that location was able to continue to observe Sullivan's activities.

¹⁵ Jones' shift began at 3 p.m. and Hoffman's ended at 5:30 p.m.

Hoffman incredibly testified to a certainty that the signs were not posted at the plant. I do not credit Hoffman's professed lack of knowledge of the signs being posted since he admitted frequenting the cafeteria and visiting the production area. Rather, I have concluded since he testified he was not pre-tried for the hearing, that he did not know whether he should admit to the posting of the signs, and concluded the safest course was to deny their existence. I have reached this conclusion based on the location of the signs, and the general unreliability of Hoffman's testimony.

Sullivan testified that she owned and wore at the plant the Vote No shirts and bandanas, and implied that she also owned and wore the hats. She testified she wore the bandanas both on her leg and on her head. She testified her purpose in wearing the Vote No regalia was to demonstrate its existence to employees so that they could request these items for themselves. Thus, Sullivan was clearly an enthusiastic participant in the Employer's anti union campaign. Sullivan was so much an active participant that she also testified that when employees were afraid to walk back to the office area to pick up the anti-union attire, upon their request, Sullivan accompanied them there to allow them to obtain the paraphernalia, which she watched them pick up. Considering her demeanor, the substance of her testimony, and her strong anti-union stand, I have credited Jones' testimony over Sullivan's denial, and have concluded Sullivan distributed the Vote No paraphernalia on the plant floor on February 11, in the manner described by Jones.

I have concluded, based on Jones' credible testimony that on February 11, the Monday of the week of the February 14 and 15 election, that Sullivan distributed multiple items of Vote No paraphernalia on the production floor at shift change between the first and second shift. I have concluded, as Jones' testified, that Sullivan offered the items without request by employees. I have concluded that Hoffman also distributed items on the same date. Hoffman claimed an employee requested one item and that he complied with the request. However, Hoffman's testimony vacillated as to the whether item was a shirt or a bandana. Moreover, Jones credibly testified he saw Hoffman give an item to a female employee, while Hoffman admitted providing an item to a male employee. I have concluded that Hoffman gave items to at least two employees, the one identified by Jones and the one admitted by Hoffman. Jones also testified he saw Hoffman on the plant floor with shirts in Hoffman's hand. Thus, I have concluded that Hoffman gave out more anti-union paraphernalia on the production floor than he was willing to admit, and more than the two items that were specifically identified at the hearing. I have also not credited his testimony that he gave the items at the employees' request, but find instead that gave out the items on his own volition. In this regard, I have concluded that as the election approached, the Employer had not distributed as many items as it desired, in part because of a fear of employees to enter the office, so it took to having its supervisors and work leaders make unsolicited distributions of the items on the production floor on February 11, the week of the election, as Jones credibly testified.

D. Analysis

In *Delta Brands, Inc.*, 344 NLRB 252, 252-253 (2005), it was stated that:

It is well settled that "[r]epresentation elections are not lightly set aside." *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Thus, "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Id.* Accordingly, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Kux Mfg. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (internal citation omitted). The objecting party must show, inter alia, that the conduct in question affected employees in

the voting unit, *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of alleged coercive incident), See *Antioch Rock & Ready Mix*, 327 NLRB 1091, 1092 (1999), and had a reasonable tendency to affect the outcome of the election. *Id.*

In *Virginia Concrete Corporation, Inc.*, 334 NLRB 796 (2001), the Board found the distribution of Vote No T-shirts to employees directly by members of management to constitute objectionable conduct warranting the setting aside of an election. The Board considered the number of employees who received the items and the closeness of the election in deciding that the election should be set aside. In *Circuit City Stores, Inc.*, 324 NLRB 147 (1997), the Board majority held that an election should be set aside based on an employer's objectionable conduct. The following principles were stated:

We agree with the hearing officer that the Employer's store manager, Robert Mainart, engaged in objectionable conduct warranting setting aside the election. We do so for the following reasons.

As found by the hearing officer, starting about 3 days before the election and continuing until the day of the election, Mainart distributed to unit employees coffee mugs bearing the slogans "Vote No" and "Just Vote No." Mainart individually approached each employee, shook the employee's hand, asked the employee to vote no, and handed the employee the mug. Initially, the mugs did not contain the employee's name, but Mainart later labeled the remaining mugs with employees' names in order to keep track of which employees had not yet received a mug. Mainart distributed a total of about 80-90 mugs, 70 or 75 of which were distributed with employees' names on them.

Under established Board precedent, employers may make antiunion paraphernalia available to employees at a central location, provided that supervisors are absent from the distribution process and there is no other coercive conduct in connection with the distribution. *Barton Nelson, Inc.*, 318 NLRB 712 (1995); *Gonzales Packing Co.*, 304 NLRB 805, 815 (1995). However, employers are precluded from creating situations in which employees are forced to disclose their union sentiments. *Lott's Electric Co.*, 293 NLRB 297, 303-304 (1989), enf. Mem. 891 F.2d 281 (3d Cir. 1989). Thus, employers may not distribute campaign paraphernalia in a manner pressuring employees to make an observable choice that demonstrates their support for or rejection of the union. *A.O. Smith Automotive Products, Co.*, 315 NLRB 994 (1994). In *A. O. Smith*, the Board found that by having its supervisors directly offer employees antiunion paraphernalia, the employer effectively put employees in a position of having to accept or reject the employer's proffer and thereby make an observable choice that would reveal something about their union sentiments.

In *Barton Nelson, Inc.*, 318 NLRB 712 (1995), it was found that three supervisors distribution of anti-union hats the week before an election "presumably" to a large number of employees warranted the setting aside of that election. In *A.O. Smith Automotive Products, Co.*, supra, the Board found supervisors directly offering employees anti-union paraphernalia was conduct violative of Section 8(a)(1) of the Act.

In *Gonzales Packing Co.*, 304 NLRB 805 (1991), the Board majority stated, "We adopt the judge's finding that the Respondent violated Section 8(a)(1) of the Act by soliciting its employees on the day before the election to wear or display antiunion "NO" stickers." The Board also reversed the judge, and concluded the respondent's conduct rose to the level of objectionable conduct warranting that an election be set aside. The Board majority stated:

The Board held in *Dal Tex Optical Co.*, 137 NLRB 1782, 1786 (1962), that “[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election.” As the judge noted, the Board stated in *Clark Equipment Co.*, 278 NLRB 498, 505 (1986), that:

[t]he Board has departed from this policy in cases where it is virtually impossible to conclude that the misconduct could have affected the election results. In determining whether misconduct could have affected the results of the election, we have considered “the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors.” [Footnote omitted.]

The record here shows that Marcelina Quitevis supervised 50 to 60 employees, about half the eligible voters, in the Respondent's sorting and grading department. The judge found that the Respondent violated Section 8(a)(1) on the day before the election when Quitevis visited 10 eligible voters at their work stations and asked each if they wanted a “NO” sticker like those that antiunion employees had worn during the election campaign. In so concluding, the judge noted that “Quitevis' unfair labor practice was committed repeatedly, with obvious calculation, [and] was likely to have been witnessed by most of the ... employees in her department.” The judge also recognized the closeness of the subsequent election in which the tally of ballots shows 52 for and 59 against the Petitioner, with 6 nondeterminative challenged ballots. Despite the above factors, the judge found that he could not “envision how Quitevis' conduct could possibly have interfered with [the election]”

Contrary to the judge, we conclude that the Respondent in this case engaged in objectionable conduct that warrants setting aside the election. We rely on the nature of Quitevis' conduct, its proximity in time to the election, the number of employees that Quitevis solicited that day, the likelihood that many of the 40 or 50 other employees in Quitevis' department may have witnessed her repeated unfair labor practice, and the closeness of the election. For these reasons, this is not a case where it is “virtually impossible” to conclude that the Respondent's misconduct could have adversely affected the election results.

In the instant case, Brown's testimony reveals there are four primary shifts at the plant. The first shift is Monday through Thursday from 5 a.m. until 3 p.m. The second shift is Monday through Thursday from 3 p.m. to 1 a.m. The third and fourth shifts are weekend shifts. Thus, Jones' credited testimony reveals that on Monday, February 11, just three days before the February 14 and 15, election, at around 3 p.m., the time of the shift change for the two weekday shifts, Jones saw Production Superintendent Mary Sullivan stationed on the production floor outside the production office. Sullivan was positioned near the time clock where employees punch in and out, and near the production office window where employees receive their assignments for the day.¹⁶ Jones testimony reveals that he saw Sullivan, along with the shift leaders, handing out Vote No paraphernalia, including hats, shirts, and bandanas.¹⁷ Jones saw Sullivan hand out shirts or other “Vote No” items to at least eight different employees. All of the eight individuals took the items from Sullivan, although Jones could see a couple of employees hesitate before they took the items. Jones testified Sullivan is a very forceful person, and it seemed like she was demanding that they take it, “when she was, like, handing it to them, like, pushing it at them, you know. And a couple of people stood back, but then they ended up

¹⁶ Jones testified Sullivan was handing the materials out “outside the office, right in the main aisle where you come in and you got to go past the office to get to the time clock to punch in, then you come back past around there to look to see where you going to be located for that day to work.”

¹⁷ Sullivan's testimony reveals that she regularly wore these Vote No items to work.

taking it from her...". Jones testified he saw one or two of the recipients put the items on when Sullivan was handing them out. Jones testified a couple of the employees told him they were going to keep the items, but not wear them. Jones stayed there for just a few minutes because he had to report to his job, which was running a machine. Jones testified, "But I stood there for a while and watched her give them out. She was you get your shirt, you want a hat, you know, handing them out. Had a handful of them." Jones explained there is a rail in front of the production office and Sullivan had the hats stacked up on the rail and had shirts on her arm. Sullivan had the bandanas hanging out her pocket. Jones was about seven feet away from Sullivan at the time, and that he did not hear any of the employees ask for the paraphernalia, rather Sullivan was just offering it to them.

Jones testified there was a lot of traffic in area where Sullivan was handing out the paraphernalia at that time of the day and that traffic was heavy at the time Sullivan was distributing the materials, "because you have people moving out and people coming in." Jones testified he saw "people was walking past and then everybody was talking about the fact that, you know, she was handing the shirts out and the people that was leaving, some of them had shirts on and some had shirts in their hand, if they were leaving out. And then the ones that was coming in was the ones she was handing the shirts to and -" Jones testified he saw first shift employees leaving the job who were wearing anti union paraphernalia. Jones testified his job assignment was about 50 or 60 feet away from where Sullivan was handing out the materials. Jones testified could see Sullivan from where he was working and that she stood outside the office for at least 30 minutes that he was aware. Jones testified he observed from his work station that Sullivan continued to hand out the items as people walked by and that she was saying things as she handed employees the shirts. Jones could not state how many shirts Sullivan gave out while he was at his work station.

Jones credibly testified that on February 11, he also saw Hoffman, operations manager for the driers department in Rooms 1, 2 and 3, walk through the plant with a couple of Vote No shirts on Hoffman's arm and that Hoffman handed one of the shirts to a female employee. Hoffman admitted giving one of the Vote No paraphernalia on the production floor to a male employee, and contended it was at the request of the employee. Hoffman at first testified he had retrieved a shirt for the employee, and then changed his testimony stating it was a bandana. For the reasons set forth above, I did not find Hoffman to be a credible witness. Jones saw him give a shirt to a female employee, and Hoffman testified he gave a bandana to a male employee. Moreover, Jones saw Hoffman on the production floor with a couple of the shirts on his arm, and Hoffman initially testified he retrieved a shirt for distribution for an employee. Given Jones' testimony and Hoffman's admission I have concluded Hoffman distributed at least two, and probably more items than that on the production floor to employees. Given the timing of Hoffman's distribution seen by Jones, that is taking place the same day as Sullivan's offerings to employees, I have also concluded Hoffman's distributions were also not at the request of the employees. Rather, I have concluded his actions were part of a coordinated effort to distribute the Vote No paraphernalia without request by the employees close in time to the election.¹⁸

¹⁸ Jones testimony reveals that on February 11, that in addition to Sullivan and Hoffman, work leaders were also distributing the Vote No paraphernalia on the plant floor. While Jones testified work leaders could vote in the election, their distribution of the materials was in contravention of the Employer's posted policy that the employees were to pick up the items on the own during the first hour of their shift. Noting the timing of the work leaders distribution of the materials, that is the same day that admitted supervisors Sullivan and Hoffman were doing it, and in view of Sullivan's high visibility in the dispersal, I have concluded that the work leaders

Continued

I have concluded that Employer has engaged in objectionable conduct warranting the setting aside of the February 14 and 15 election. The unsolicited distribution of anti union paraphernalia by supervisors to employees has been found by the Board to be objectionable conduct, and when raised in the unfair labor practice arena to be violative of the Act. In reaching this conclusion, I have taken into consideration that the Union lost the election by 30 votes. However, the Employer's distribution here took place by two supervisors and work leaders just 3 days prior to the election. One of the supervisors is a superintendent and her distribution took place on the production floor during the shift change for the employees for the Employer's main weekday shifts. In this regard, Sullivan was strategically stationed near the time clock where employees punched in and out at the shift change and near where they received the assignments. Sullivan's actions were therefore in plain view of large numbers of employees of both shifts. As Jones testified, all the employees were talking about her actions, while some were wearing, and others carrying the materials. Moreover, the effects of the Employer's actions here lingered. In this regard, employees who felt pressure to wear the items when they otherwise might not have done so, served as continuing advertisements for the Employer's cause and as a strong reminder of its objectionable conduct during the week of the election. Accordingly, I sustain Petitioner Objection 1.

CONCLUSIONS

Based on the forgoing, I have sustained Petitioner Objection 1. Because I have sustained Objection 1 the election must be overturned. The case is remanded to the Regional Director to hold a new election. The notice for the new election shall include a statement of the reason for the new election. See *Fieldcrest Cannon, Inc.*, 327 NLRB 109, 110, fn. 3 (1998).

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military service may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote on whether they desire to be represented for collective bargaining by Teamsters Local 570, International Brotherhood of Teamsters.

To ensure all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters

had apparent authority to distribute the paraphernalia on the Employer's behalf, and hold the Employer accountable for their actions.

must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances.

5 Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this report may be filed with the Board in Washington, DC within 14 days from the date of

10 issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by May 21, 2008. Immediately upon the filing of such exceptions, the party filing them shall serve a copy on the other parties and shall file a copy with the Regional Director of Region 5. If no timely exceptions are filed, the Board will adopt the recommendations set forth herein.

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Dated, Washington, D.C., May 7, 2008

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Eric M. Fine
Administrative Law Judge